

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 4/14/11 has been entered.

The 102 rejection over Gielen has been overcome by applicants' amendments. However the following 103 rejection pertains to the amended claims.

Claims 4,5,14 and 21 are rejected under 35 U.S.C. 103(a) as being obvious over Gielen (WO'410).

The applied reference has a common inventors with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art only under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 103(a) might be overcome by: (1) a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not an invention "by another"; (2) a showing of a date of invention for the claimed subject matter of the application which corresponds to subject matter disclosed but not claimed in the reference, prior to the effective U.S. filing date of the reference under 37 CFR 1.131; or (3) an oath or declaration under 37 CFR 1.130 stating that the application and reference are currently owned by the same party and that the inventor named in the application is the prior inventor under 35 U.S.C. 104, together with a terminal disclaimer in accordance with 37 CFR 1.321(c). This rejection might also be overcome by showing

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that the reference is disqualified under 35 U.S.C. 103(c) as prior art in a rejection under 35 U.S.C. 103(a). See MPEP § 706.02(l)(1) and § 706.02(l)(2). While the species in Gielen are no longer anticipatory several are very structurally similar. See examples 16 and 24/25 Example 16 only differs in having H vs instant alkyl (methyl,etc.) on amino in the R6 choice, N-alkyl-N-cycloalkylamino carbonyl. For examples 24/25 the sole difference is H vs instant alkyl (methyl,etc.) on the phenyl group corresponding to R6 choice , monoalkylaminocarbonyl where the alkyl portion is substituted with phenyl which in turn is substituted by an alkyl group. H vs Me on N or C atoms in otherwise similar compounds is not considered patentably distinct absent evidence of superior,unexpected results. Note In re Wood 199 USPQ 137; In re Lohr 137 USPQ 548 for such a difference on carbon atoms and In re In re Weston 121 USPQ 428 and In re Doebel 174 USPQ 158 regarding the patentability of H vs. alkyls on nitrogens. Thus it would have been obvious to one skilled in the art at the time the instant invention was made to expect the methylated analogs of closest species in Gielen to also possess the activity taught by the art in view of the close structural similarity pointed out above.

Gielen is not being applied as of its publication date since the claims are entitled to benefit under 35 USC 119.

Claims 4,5,14 and 21 remain rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1,2,5-10,12,13 and 15-17 of U.S. Patent No. 7,230,017. Although the conflicting claims are not identical, they are not patentably distinct from each other because they embrace subject matter in the 2 cases which are obvious variants as discussed in the above 103

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rejection as the copending case corresponds to WO Gielen applied above. Such compounds are considered obvious variants as discussed in the above 103 rejection.

See case law cited therein and additionally In re Bowers 149 USPQ 570.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Emily Bernhardt whose telephone number is 571-272-0664.

If attempts to reach the examiner by telephone are unsuccessful, the acting supervisor for AU 1624, James O. Wilson can be reached at 571-272-0661. The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

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/Emily Bernhardt/  
Primary Examiner, Art Unit  
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